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NO. 88-1503

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER L. and JOYCE CRUZAN,

Petitioners,

vs.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,

Respondents,

vs.

THAD C. McCANSE, Guardian ad litem,

Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

Brief of *Amici Curiae* in support of Petitioners

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INTERESTS OF *AMICI CURIAE**

This brief *amici curiae* is filed on behalf of numerous Colorado non-profit corporations and organizations as well as individuals who deal regularly with the problems faced by Nancy Cruzan, her parents and the state of Missouri in the case before the Court. This diverse group is made up of the following:

1. State-wide medical and healthcare organizations, including the Colorado Medical Society, the Colorado Chapter of the American Academy of Family Physicians and the Colorado Hospital Association;

2. Hospital, trauma center and rehabilitation facilities including Children's Health Corporation, Rose Medical Center, Craig Hospital, Spalding Rehabilitation Hospital, and Swedish Medical Center;

3. A senior citizen organization, The Association of Senior Citizens, Inc.;

4. The leading Colorado biomedical ethics organization, the Center for Health Ethics and Policy, University of Colorado at Denver, and;

5. Leading individuals who regularly work with cases and issues in this area, including:

   (a) Fredrick R. Abrams, M.D., bioethicist;

   (b) Frank Marsh, Professor of Medical Ethics and Law, University of Colorado Health Sciences Center;

   (c) Katherine Pring, Director of the Adult Services Division of the Denver, Colorado Department of Social Services, and;

   (d) David H. Miller, Esq., Legal Director of the American Civil Liberties Union Foundation of Colorado.

These organizations and individuals have long standing, intense and personal interests in right-to-refuse treatment law as it has developed in Colorado. They have been involved in cases such as Nancy Cruzan's and wish to share with the Court their experience and opinion in the hope that it will prove helpful in resolving this case.

* The parties to this case have consented to the filing of this *amici* brief. The letters providing consent have been filed with the Clerk of this Court.

ARGUMENT

The position of this brief is that this Court should overrule the decision of the Missouri Supreme Court in *Cruzan v. Harmon* and confirm that the right of an incompetent person to refuse and terminate medical treatment is protected by the United States Constitution. The Missouri Supreme Court decided against terminating artificial hydration and nutrition. While the Missouri living will statute was not at issue, the Court saw the statute's prohibition against terminating nutrition and hydration as a broad policy statement which required that life be sustained without regard to its quality. This brief argues that action by the United States Supreme Court is necessary, not only to correct error in *Cruzan*, but also to provide guidance in other state law situations.

The state of Colorado has a living will statute which has been amended to allow artificial nourishment to be withheld or withdrawn. This difference, however, would not prove dispositive if a case on the same facts should be presented in Colorado. Matters affecting life and death ought not be subject to varying interpretations of state law not directly at issue in the case. Furthermore, there are other questions left open by the Colorado living will statute and presumably by the living will statutes of many other states. Action by the United States Supreme Court to clarify the constitutional rights of the incompetent person is necessary in order to assure to all persons recognition and preservation of basic rights without regard to the state of residence and variation in tangentially related state laws.

I. THE CONSTITUTIONAL RIGHT TO REFUSE AND TERMINATE MEDICAL TREATMENT IS AVAILABLE TO INCOMPENENT PERSONS.

The right to refuse medical treatment has long been recognized[1]. It is sometimes articulated as a requirement of consent to medical

[1] *See* Matthews, *Comment: Suicidal Competence and the Patient's Right to Refuse Lifesaving Treatment*, 75 Calif. L. Rev. 707, 721 (1987) (hereinafter cited "Matthews, *Suicidal Competence*") where the common law origin is described as follows:

treatment.[2] The unchallenged existence of numerous living will statutes in the various states also supports, but does not entirely limit, the right.[3]

"The right to refuse treatment exemplifies the right of a person to control her own body, a right with ancient roots in the common law. (footnote omitted) It is well articulated by two often-quoted judicial statements. In 1891, the United States Supreme Court observed:

No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooly, 'The right to one's person may be said to be a right of complete immunity: to be let alone.' *Union Pac. Ry. v. Batsford*, 141 U.S. 250, 251 (1891) (quoting T. Cooley, *A Treatise on the Law of Torts* 29 (1888)).

And in 1914, the New York Court of Appeals stated succinctly that "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." citing *Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914).

The constitutional right of privacy has been attributed to *Roe v. Wade* 410 U.S. 113 (1973) and *Griswold v. Connecticut*, 381 U.S. 479 (1965). This case law follows from Justice Brandeis' description of the right of privacy as referred to in Matthews, *Suicidal Competence* 723 n.120:

". . .The development of the privacy right drew on the common law right of self-determination, as can be seen from Justice Brandeis's dissenting opinion in *Olmstead v. United States*, 277 U.S. 438 (1928), often cited as a leading argument for the constitutional right of privacy: 'The makers of our constitution. . .sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.' *Id.* at 478 (Brandeis, J., dissenting)."

[2] For a statement of the requirement and collection of supporting authorities *see* Krasik, *The Role of the Family in Medical Decisionmaking for Incompetent Adult Patients: A Historical Perspective and Case Analysis*, 48 U. of Pitt. L. Rev. 539, 542 (1987) (hereinafter cited "Krasik, *Role of the Family in Medical Decisionmaking*").

[3] *See, e.g.*, Colo. Rev. Stat. § 15-18-102 (1987 Repl. Vol. 6B).

"15-18-102. Legislative declaration. (1) The general assembly hereby finds, determines, and declares that:

It is also asserted that the state has an interest in regulating the exercise of this right of self-determination. The state's interest was described in *Cruzan* in terms of the preservation of life, the prevention of suicide, the protection of innocent third parties, and the integrity of the medical profession.[4] All state courts which have considered the issue have recognized that the competent individual's choice takes precedence over the state interest.[5]

The incompetent person has the right to make the same decisions.[6] The interest of the state and the interest of the individual are weighed by some courts which find, in the case of an incompetent, as the quality of life for the incompetent decreases the interest of the state in the preservation of life also decreases.[7] Contrary to such reasoning, in *Cruzan* the Supreme Court of Missouri determined that the state's interest was in "life" rather than in "quality of life" and upheld the state interest.[8]

(a) Colorado law has traditionally recognized the right of a competent adult to accept or reject medical or surgical treatment affecting his person; . . ."

[4] *Cruzan v. Harmon*, 760 S.W.2d 408, 419 (Mo. 1988).

[5] *See, e.g., Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986) (competent patient, whether terminally ill or not, has the right to refuse any and all medical treatment regardless of motive); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984) (competent patients have a general right to decide whether or not to submit to medical treatment).

[6] No cases have been found that deny to incompetent persons the right of self-determination in medical treatment decisions. To do so would surely raise equal protection questions. *See Skinner v. Oklahoma*, 316 U.S. 535 (1942).

[7] *See, e.g., Barber v. Superior Court*, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983) (incompetent patient in persistent vegetative state who acted through a surrogate was entitled to have life sustaining treatment withdrawn). *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) (the right of an incompetent in persistent vegetative state with no hope of improvement outweighed the state's interest in compelling treatment).

[8] *Cruzan*, 760 S.W.2d at 419-420.

In any consideration of the rights of a competent or incompetent patient as opposed to the interests of the state the fundamental recognition of the rights of the individual indicate priority for that right so long as it is expressed as the desire of the patient and not influenced or affected by interests other than the patient's welfare. It is submitted that the interest of the state should be exercised only to the point of assuring that the expressed desire of the patient does in fact represent the patient's true desire and is not influenced by other interests.[9] When the freedom of choice of the patient is clear the interest of the state in preventing the exercise of the patient's choice wanes significantly.

The interests of the state may be analyzed in view of the situation presented by Nancy Cruzan. She is in a persistent vegetative state with no prospect of improvement. She must be sustained by artificial nutrition which is introduced through the gastrostomy tube, but so long as nutrition is thus provided she has a life expectancy of many years.[10] She cannot interrelate with her family, friends or anyone else. No one who cares for Nancy Cruzan can interact with her or vice versa.

While the *Cruzan* court asserts that the state has an interest in the preservation of life, no definition of the word "life" is provided. Does not the word "life" connote an ability to relate to — to have some sensual interchange with — one's surroundings? The ordinary person can experience sensations from sight, hearing, smell and touching. The brain records and processes sensations from each of those capacities and thought patterns reflect and register reaction to those sensations. Many people in our society function effectively without the ability to handle one or more of those senses. But if a person is denied *all* senses and the ability to process sensations from those senses, what is left of life? Surely the word "life" implies more than breathing, and in many situations the ability to breath may be provided artificially through a respirator. Breathing is all Nancy Cruzan can do. What remaining interest does the state seek to protect? It is submitted that the state's only remaining interest is in avoiding mischief in the exercise of the patient's rights, including, as in this case, the right to refuse medical treatment.

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[9] The Missouri Supreme Court specifically acknowledged the *bona fides* of the parents in this case. *Id.*, at 412.

[10] *Id.*, at 411.

The state's interest in preventing suicide should be understood in the same way. Since it can be concluded that under certain circumstances, the state's interest in the continuation of life diminishes, then it can also be concluded that the state's interest in preventing the termination of that life as an incident of the patient's right of self determination also diminishes.

The third state interest in the protection of innocent third parties can be waived in this situation since such parties are in concurrence with the decision of the patient. If this is not the case a judicial determination of the relative interests may be appropriate.

Finally, the integrity of the medical profession is not at issue since that profession aligns with the interests of the patient as evidenced by other *amicus* briefs filed in this proceeding. The ethical and moral considerations of a particular physician need not be compromised since that physician may always transfer responsibility to another physician who accepts the determination of the patient.

The United States Supreme Court should confirm the existence under Amendments V, IX, XIV of the United States Constitution of the right of all individuals to make decisions concerning the refusal or termination of medical treatment in the name of the right of privacy, the right of the individual to personal liberty and the right to due process of law.

II. CONFIRMATION OF THE CONSTITUTIONAL PRINCIPAL IS IMPORTANT EVEN IN THOSE STATES WHICH HAVE RECOGNIZED BY STATUTE A PARTICULAR METHOD OF REFUSING AND TERMINATING MEDICAL TREATMENT.

California enacted the first "living will" statute in 1976. By early 1989, 39 states, plus the District of Columbia, had enacted some type of living will statute.[11] In 1985, the Commissioners on Uniform State Laws adopted the "Uniform Rights of the Terminally Ill Act"[12] which

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[11] *See* Francis, *The Evanescence of Living Wills*, 24 Real Property, Probate and Trust Journal 141, 145 n.16 (1989) (hereinafter cited as "Francis, *Evanescence of Living Wills*").

[12] 9B Uniform Laws Annotated 611 (1987)

has been adopted in six states.[13] However, there continues to be a wide difference in the provisions of most living will statutes.

Living will statutes permit persons, while competent, to direct that life-prolonging care not be administered after the individual becomes incompetent and terminally iil.[14] If a state has not enacted a living will statute there may be no expression of the state's interest and thus no guidance with respect to the right of a person to refuse the continuation of life-sustaining medical treatment. The confirmation of the constitutional right to reject medical treatment becomes of paramount importance to persons in those states which do not have expressed limitations on the state's interest. And, of course, the confirmation is important in those states, such as Missouri, where the state interest is interpreted contrary to the constitutional right.

The various living will statutes present a variety of weaknesses or points for challenge which leave them deficient in providing solutions to all situations. For example, in Colorado the living will statute may only be utilized by a competent adult which means any person 18 years of age or older.[15] This makes the state enabling legislation unavailable to minors or to persons who were never competent. The Colorado statute does not require that the statutory form be used[16] and

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[13] Francis, *Evanescence of Living Wills* 146 n.20.

[14] The limitations on the use of the living will are important. In Colorado, for example, the individual must be in a terminal condition which means "an incurable or irreversible condition for which the administration of life sustaining procedures will serve only to *postpone the moment of death*". (emphasis supplied). In addition, the individual must be either unconscious or otherwise incompetent to decide whether any medical procedure or intervention should be accepted or rejected. Then the individual can reject a "life sustaining procedure" which means any medical procedure that would *serve only to prolong the dying process*. (emphasis supplied). The life sustaining procedure which may be rejected shall not include any medical procedure or intervention for nourishment of the qualified patient or considered necessary by the attending physician to provide comfort or alleviate pain. However, artificial nourishment may be withdrawn or withheld. Colo. Rev. Stat. § 15-18-103(7) (1987 Repl. Vol. 6B) and § 15-18-104(2.5)(a) as amended. Act approved March 29, 1989, H.B. 1036, 1989 Colo. General Assembly.

[15] Colo. Rev. Stat. § 15-18-103(1) (1987 Repl. Vol. 6B).

[16] Colo. Rev. Stat. § 15-18-104(3) (1987 Repl. Vol. 6B).

there are requirements of execution which may be defective in any particular situation.[17] In order for a Colorado living will to be effective the declarant must be in a "terminal condition,"[18] which means "an incurable or irreversible condition for which the administration of life-sustaining procedures will serve only to postpone the moment of death."[19] Persons in a coma may live in a persistent vegetative state for a long period of time and thus a significant ambiguity is created by the requirement of postponing the "moment of death."

There are other ambiguities in the Colorado statute and there may be different ambiguities in the living will statutes in other states. In Colorado the following situations would not be covered by its present living will statute: (i) an incompetent now who failed to make a living will declaration while competent, (ii) a competent or incompetent minor with no possibilty of recovery, (iii) incompetent from birth and thus unable to execute a living will, (iv) incompetent person in a persistent vegetative state with the possibility of living many years (*e.g.*, Nancy Cruzan), (v) competent but with significant pain with possibility of living many years with no hope of recovery. All these ambiguities and variations in state law raise significant questions as to rights of declarants under living will statutes and require focusing on the underlying determiantion of the right of an individual effectively to terminate life-sustaining procedures. The existence of a living will statute is simply not adequate protection for the person who may be unable to exercise his or her own choice at the time of need.

Another means for identifying an agent with power to act involves the use of the "durable power of attorney" which has been authorized in Colorado[20] and in all other states.[21] The Colorado statute provides that the agent may consent to or approve medical care.[22] The durable

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[17] Colo. Rev. Stat. § 15-18-105 and 106 (1987 Repl. Vol. 6B).

[18] Colo. Rev. Stat. § 15-18-104(1) (1987 Repl. Vol. 6B).

[19] Colo. Rev. Stat. § 15-18-103(10) (1987 Repl. Vol. 6B).

[20] Colo. Rev. Stat. § 15-14-501 to 502 (1987 Repl. Vol. 6B).

[21] F. Collin, et. al., *Drafting the Durable Power of Attorney — A Systems Approach*, Shepard's/McGraw-Hill, 2d ed., 1987, 6.

[22] Colo. Rev. Stat. § 15-14-50' (1987 Repl. Vol. 6B).

power may be drafted to survive a determination of incapacity on the part of the principal, and thus may be effective when the principal is in a persistent vegetative state but with no immediate prospect of dying. The effect of the utilization of the durable power of attorney is to allow the incompetent person, through the appointed agent, to exercise the right to refuse medical treatment just as if the principal were competent. The use of the durable power is not subject to the same limits of the living will requiring a state of unconsciousness and a terminal condition.

Even though the utilization of the durable power of attorney provides more certainty than the use of the living will, it is no total substitute for the recognition of the constitutional right to reject medical treatment. The appointment of an agent under a durable power may be revoked by a conservator and it still requires action by a competent adult in the first instance, so this legislation also leaves unaswered the problem of the incompetent who has never been competent and the incompetent who failed to act while competent.

Without the confirmation of the right under the United States Constitution to reject medical treatment there is a continuing risk that the right will remain unprotected by state law.

III. THE RIGHT OF AN INCOMPETENT PERSON TO REFUSE AND TERMINATE MEDICAL TREATMENT CAN AND SHOULD BE EXERCISED IN THE SAME MANNER AS OTHER RIGHTS OF SUCH PERSONS.

The right of a person to reject life-sustaining medical treatment is a private right, rather than a right to be exercised by the state. Its private nature is based on the right of privacy, right to liberty and right to due process of law. Ordinarily any right that is personal to the person involved is to be exercised by that person if he or she is capable of doing so.

In the society are those who are mentally retarded, mentally impaired by accident or illness, senile, or otherwise severely incapacitated. Their circumstances render them incapable of making many significant decisions. It does not follow that the right to make such decisions is automatically sacrificed by virtue of the disability. The prevailing law has long recognized the right of an incompetent person to have a

surrogate make decisions on his or her behalf.[23] State statutes provide a well regularized identifying mechanism by which to select such a surrogate[24] under procedures tested over and over again in dealing with the affairs of disabled persons. They stand as a charter of the procedure to protect and regularize the use of substituted judgment to exercise the whole catalogue of a disabled person's rights, privileges and obligations.[25] They wait in the wings for a call to deal with the the process and respond readily to the need for decision making, even to making the profoundly serious decision of withholding or terminating medical care. To ignore their efficacy for this calling would effect nothing less than a stripping from incompetent persons of a truly vital constitutional right, resulting inevitably in a denial of equal protection.

Thus a procedure already exists for clarifying the hierarchy of responsibility for substituted decision making. It is readily accessible for either informal or formal identification of the appropriate person or persons upon whom the mantle should fall. In circumstances in which the responsibility for substituted decision making is not seen as falling upon a group so ill defined as a "family", then certainty is available via a given state's statutory scheme.

When a decision maker is thus identified, what further level of formality in decision making or decision confirmation is still necessary or appropriate? Stated otherwise, should every case mean a run to the court? Such a run is certainly inappropriate for a fully competent person who has exercised his or her right to refuse and terminate treatment by living will or durable power of attorney mechanisms prior to the onset of a posisble terminal illness or unconsciousness. It is submitted that it is no more appropriate for an incompetent person when a sanctioned surrogate decision maker is in place. Court approval of

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[23] "Once a determination has been made that a patient is incompetent, a substitute decisionmaker is required to make health care decisions. The customary practice is for health care providers to seek consent from the patient's spouse or next of kin. This tradition has a long history in the common law (footnotes omitted)". Krasik, *Role of the Family in Medical Decisionmaking* at 548.

[24] See, e.g. Colo. Rev. Stat. § 15-14-311(2) (1987 Repl. Vol. 6B.) App., *infra.*, Bl.

[25] See Krasik, *Role of the Family in Medical Decisionmaking* at 554.

decisions of the surrogate should not be required, although any person (including relatives, physicians or hospital) with an interest can always open a proceeding to challenge any proposed action. The surrogate should also be free to seek court guidance in those situations where it is thought prudent to do so.[26]

In these situations the interests of the disabled person will be paramount and well protected. For example, when the surrogate decision maker exercises a personal right for another, the action to be taken is tested in terms of the putative choice or desire of the principal. To the extent that the probable action that the principal would have chosen if he or she has been able to make the choice can be established or discerned, the surrogate will choose that same action. These situations obviously demand that the surrogate make every effort to determine the principal's probable choice and to exercise the power of agency to make that choice. This properly involves consideration of preferences or choices expressed directly by the principal or deduced from any other available statements or circumstances.[27]

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[26] Under some circumstances court intervention may be needed to balance objectively the competing interests of patient, family and others; court action promotes impartiality and acceptance of the rule of law; and only the courts can insulate the participants from civil and criminal liability. Objections to court intervention include the unnecessary prolongation of action, decisions requiring medical expertise have traditionally been made by doctors and families, recourse to the courts interferes with the doctor/patient relationship, and the changing nature of the patients condition mandates an immediate response to the situation. *See* Krasik, *Role of the Family in Medical Decisionmaking* at 563.

[27] In *Brophy v. New England Sinai Hosp., Inc.*, 298 Mass. 417, 497 N.E. 2d 626 (1986) the court identified the following factors in determining whether a patient in a 'persistent vegetative state' would refuse a feeding tube:

(1) The patient's expressed preferences;
(2) The patient's religious convictions and their relation to the refusal of treatment;
(3) The impact on the patient's family;
(4) The probability of adverse side effects;
(5) The prognosis with and without treatment; and
(6) The impact on the patient of his present and future incompetency."

When there is no clear indication as to choice, and no deductions may be based on other indications of preference, surrogates obviously decide on actions that are in the best interest of the principal, insofar as the surrogate is able to determine such actions. In classic extreme cases, such as the instant one, these factors would reasonably include consideration of the suggestions of the family and relatives, prognosis of the possibility of recovery, the cost of treatment, the impact of futile treatment on other members of the family or persons close to the principal and the level of suffering or pain to which the principal is subject.

On balance, existing systems in place to provide for the exercise of substituted judgment and decision making for incompetent persons are available and well suited to secure the constitutional right of the incompetent person to refuse and terminate medical treatment. The right is private and every procedure to continue it as private should be followed. The state and its court system should be availed of only as a last resort after private procedures have been exhausted.

SUMMARY OF ARGUMENT

The right to refuse and terminate medical treatment should be confirmed as constitutional rights guaranteed by Amendments V, IX, XIV of the United States Constitution. In view of that right the decision by the Missouri Supreme Court in *Cruzan* must be overruled as it denies to Nancy Cruzan the right to terminate medical treatment in the form of a gastrostomy tube inserted into her body. The law of Missouri, as construed by the Supreme Court of the State of Missouri in *Cruzan*, is contrary to the right guaranteed by the United States Constitution to reject and terminate medical treament. The laws of other states may also be contrary to that constitutional right. It is important to recognize and confirm the constitutional right in order to clarify state law that might be interpreted contrary to the right and to confirm the right in those states that do not have laws relating to the right of a person to refuse or terminate medical treatment.

An incompetent person is not in an effective position to exercise his or her constitutional right to reject or terminate medical treatment. It is important that some person act in the place of the incompetent person. The logical choice is for any person named as a guardian of

the incompetent person to exercise that right. If no guardian has been appointed the right to act on behalf of the surrogate person should be recognized by reference to the priority of those persons designated under state law to serve as guardians of an incompetent person. The constitutional right is a personal one and may be exercised by a person or that person's agent without confirmation or supervision by the court. The only basis for intervention by the judiciary in this process would be review of the action of the surrogate if the action is questioned by any interested party as being contrary to the best interests of the protected party. Interested parties may include the family of the patient or physicians or hospitals, or any other persons with an interest in the proceeding.

The constitutional right to be confirmed by the Court in this case may terminate at this point with the balance of the decision making process to be left to the development of the law in the various states, except for a determination that the interest of the patient is paramount to the interest of the state. The state's interest is limited to determining that the interest of the patient is being exercised by the patient or by the patient's surrogate according to the patient's wishes or in the patient's best interests. The state has a legitimate interest in assuring that competing interests and conflicting interests are not allowed to influence the decision that is made for the patient, but if those interests are successfully safeguarded the desires of the patient are always to be observed.

CONCLUSION

For the foregoing reasons, these *amici* respectfully urge this Court to rule in favor of petitioners.

Respectfully submitted,

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Appendix A
Amendments to U.S. Constitution

AMENDMENTS V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; Nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix B
Colorado Revised Statutes
§ 15-14-311 (1987 Repl. Vol. 6B)

15-14-311. Who may be guardian — priorities. (1) Any competent person twenty-years of age or older or a suitable institution may be appointed guardian of an incapacitated person.

(2) Subject to a determination by the court of the best interests of the incapacitated person, persons who are not disqualified have priority for appointment as guardian in the following order:

(a) The spouse of the incapacitated person;

(b) A person nominated by the incapacitated person in writing prior to his incapacity;

(c) An adult child of the incapacitated person;

(d) A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

(e) Any relative of the incapacitated person with whom he has resided for more than six months prior to the filing of the petition;

(f) A person nominated by the person who is caring for him or paying benefits to him.

Colorado Revised Statutes
§ 15-14-501 and 502 (1987 Repl. Vol. 6B)

15-14-501. When power of attorney not affected by disability. (1) Whenever a principal designates another his attorney-in-fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal." or "This power of attorney shall become effective upon the disability of the principal." or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney-in-fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. The authority of the attorney-in-fact or agent to act on behalf of the principal shall be set forth in the power and may relate to any act, power, duty, right, or obligation which the principal has or after acquires

relating to the principal or any matter, transaction, or property, real or personal, tangible or intangible, including by way of illustration but not limitation, the power to consent to or approve on behalf of the principal any medical or other professional care, counsel, treatment, or service of or to the principal by a licensed or certified professional person or institution engaged in the practice of, or providing, a healing art. The attorney-in-fact or agent, however, is subject to the same limitations imposed upon court-appointed guardians contained in section 15-14-312 (1) (a). All acts done by the attorney-in-fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and insure to the benefit of and bind the principal or his heirs, devisees, and personal representative as if the principal were alive, competent, and not disabled. If a guardian or conservator thereafter is appointed for the principal, the attorney-in-fact or agent, during the continuance of the appointment, shall consult with the guardian on matters concerning the principal's personal care or account to the conservator on matters concerning the principal's financial affairs. The conservator has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency as it relates to financial matters. Subject to any limitation or restriction of the guardian's powers or duties set forth in the order of appointment and endorsed on the letters of guardianship, a guardian has the same power to revoke, suspend, or terminate all or any part of the power of attorney or agency as it relates to matters concerning the principal's personal care that the principal would have had if the principal were not disabled or incompetent.

(2) An affidavit, executed by the attorney-in-fact or agent, stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the termination of the power of attorney by death is, in the absence of fraud, conclusive proof of the nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

15-14-502. Other powers of attorney not revoked until notice of death or disability. (1) The death, disability, or incompetence of any principal who has executed a power of attorney in writing, other than a power as described by section 15-14-501, does not revoke or terminate the agency as to the attorneyin-fact, agent, or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees, and personal representatives.

(2) An affidavit, executed by the attorney-in-fact or agent, stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability, or incompetence is, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

(3) This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

(4) All powers of attorney executed for real estate and other purposes, pursuant to law, shall be deemed valid until revoked as provided in the terms of the power of attorney or as provided by law.

Colorado Revised Statutes
§ 15-18-102 to 106 (1987 Repl. Vol. 6B as amended,
Act approved March 29, 1989, H.B. 1036,
1989 Colo. General Assembly.)

Cited Sections of
Colorado Medical Treatment Decision Act
(Living Will Statute)

15-18-102. Legislative declaration. (1) The general assembly hereby finds, determines, and declares that:

(a) Colorado law has traditionally recognized the right of a competent adult to accept or reject medical or surgical treatment affecting his person;

(b) Recent advances in medical science have made it possible to prolong dying through the use of artificial, extraordinary, extreme, or radical medical or surgical procedures;

(c) The use of such medical or surgical procedures increasingly involves patients who are unconscious or otherwise incompetent to accept or reject medical or surgical treatment affecting their persons;

(d) The traditional right to accept or reject medical or surgical treatment should be available to an adult while he is competent, notwithstanding the fact that such medical or surgical treatment may be offered or applied when he is suffering from a terminal condition and is either unconscious or otherwise incompetent to decide whether such medical or surgical treatment should be accepted or rejected;

(e) This article affirms the traditional right to accept or reject medical or surgical treatment affecting one's person, and creates a procedure by which a competent adult may make such decisions in advance, before he becomes unconscious or otherwise incompetent to do so;

(f) It is the legislative intent that nothing in this article shall have the effect of modifying or changing currently practiced medical ethics or protocol with respect to any patient in the absence of a declaration as provided for in section 15-18-104;

(g) It is the legislative intent that nothing in this article shall require any person to execute a declaration.

15-18-103. Definitions. As used in this article, unless the context otherwise requires:

(1) "Adult" means any person eighteen years of age or older.

(2) "Attending physician" means the physician, whether selected by or assigned to a patient, who has primary responsibility for the treatment and care of said patient.

(3) "Court" means the district court of the county in which a declarant having a terminal condition is located at the time of commencement of a proceeding pursuant to this article or, in the city and county of Denver, the probate court.

(4) "Declarant" means a mentally competent adult who executes a declaration.

(5) "Declaration" means a written document voluntarily executed by a declarant in accordance with the requirements of section 15-18-104.

(6) "Hospital" means an institution holding a license or certificate of compliance as a hospital issued by the department of health of this state and includes hospitals operated by the federal government in Colorado.

(7) "Life-sustaining procedure" means any medical procedure or intervention that, if administered to a qualified patient, would serve only to prolong the dying process. "Life-sustaining procedure" shall not include any medical procedure or intervention for nourishment of the qualified patient or considered necessary by the attending physician to provide comfort or alleviate pain. However, artificial nourishment may be withdrawn or withheld pursuant to section 15-18-104 (2.5).

(8) "Physician" means a person duly licensed under the provisions of article 36 of title 12, C.R.S.

(9) "Qualified patient" means a patient who has executed a declaration in accordance with this article and who has been certified by the attending physician and one other physician to be in a terminal condition.

(10) "Terminal condition" means an incurable or irreversible condition for which the administration of life-sustaining procedures will serve only to postpone the moment of death.

15-18-104. Declaration as to medical treatment. (1) Any competent adult may execute a declaration directing that life-sustaining procedures be withheld or withdrawn if, at some future time, he is in a terminal condition and either unconscious or otherwise incompetent to decide whether and medical procedure or intervention should be accepted or rejected. It shall be the responsibility of the declarant or someone acting for him to submit the declaration to the attending physician for entry in the declarant's medical record.

(2) In the case of a declaration of a qualified patient known to the attending physician to be pregnant, a medical evaluation shall be made as to whether the fetus is viable and could with a reasonable degree of medical certainty develop to live birth with continued application of life-sustaining procedures. If such is the case, the declaration shall be given no force or effect.

(2.5) (a) The declarant may provide in his declaration that, in the event that the only procedure being provided is artificial nourishment, one of the following actions shall be taken:

(I) That artificial nourishment not be continued when it is the only procedure being provided; or

(II) That artificial nourishment be continued for a specified period of time when it is the only procedure being provided; or

(III) That artificial nourishment be continued when it is the only procedure being provided.

(b) A declaration executed prior to the effective date of this subsection (2.5) may be amended by a codicil to include the provisions of this subsection (2.5).

(2.6) Notwithstanding the provisions of subsection (2.5) of this section and section 15-18-103 (7), when an attending physician has determined that pain results from a discontinuance of artificial nourishment, he may order that such nourishment be provided, but only to the extent necessary to provide comfort and alleviate such pain.

(3) A declaration executed before two witnesses by any competent adult shall be legally effective for the purposes of this article and may, but need not, be in the following form:

DECLARATION AS TO
MEDICAL OR SURGICAL TREATMENT

I, *(name of declarant)*, being of sound mind and at least eighteen years of age, direct that my life shall not be artificially prolonged under the circumstances set forth below and hereby declare that:

1. If at any time my attending physician and one other qualified physician certify in writing that:

a. I have an injury, disease, or illness which is not curable or reversible and which, in their judgment, is a terminal condition, and

b. For a period of seven consecutive days or more, I have been unconscious, comatose, or otherwise incompetent so as to be unable to make or communicate responsible decisions concerning my person, then

I direct that, in accordance with Colorado law, life-sustaining procedures shall be withdrawn and withheld pursuant to the terms of this declaration, it being understood that life-sustaining procedures shall not include any medical procedure or intervention for nourishment considered necessary by the attending physician to provide comfort or alleviate pain. However, I may specifically direct, in accordance with Colorado law, that artificial nourishment be withdrawn or withheld pursuant to the terms of this declaration.

2. In the event that the only procedure I am being provided is artificial nourishment, I direct that one of the following actions be taken:

(Initials of Declarant) a. Artificial nourishment shall not be continued when it is the only procedure being provided; or

(Initials of Declarant) b. Artificial nourishment shall be continued for _____ days when it is the only procedure being provided; or

(Initials of Declarant) c. Artificial nourishment shall be continued when it is the only procedure being provided.

3. I execute this declaration, as my free and voluntary act, this _____ day of _____, 19___.

By _____
Declarant

The foregoing instrument was signed and declared by _____ _____ to be his declaration, in the presence of us, who, in his presence, in the presence of each other, at his request, have signed our names below as witnesses, and we declare that, at the time of the execution of this instrument, the declarant, according to our best knowledge and belief, was of sound mind and under no constraint or undue influence.

Dated at _____, Colorado, this _____ day of _____, 19___.

_____
Name and Address

_____
Name and Address

STATE OF COLORADO)
) ss.
County of _____)

SUBSCRIBED and sworn to before me by _____ _____, the declarant, and _____ and _____, witnesses, as the voluntary act and deed of the declarant this _____ day of _____, 19___.

My commission expires:

_____
Notary Public

15-18-105. Inability of declarant to sign. (1) In the event that the declarant is physically unable to sign the declaration, it may be signed by some other person in the declarant's presence and at his direction. Such other person shall not be:

(a) The attending physician or any other physician; or

(b) An employee of the attending physician or health care facility in which the declarant is a patient; or

(c) A person who has a claim against any portion of the estate of the declarant at his death at the time the declaration is signed; or

(d) A person who knows or believes that he is entitled to any portion of the estate of the declarant upon his death either as a beneficiary of a will in existence at the time the declaration is signed or as an heir at law.

15-18-106. Witnesses. (1) The declaration shall be signed by the declarant in the presence of two witnesses. Said witnesses shall not include any person specified in section 15-18-105.

(2) If the declarant is a patient or resident of a health care facility, the witnesses shall not be patients of that facility.